



March 21, 2000

Mr. Michael Kregg Phillips
Senior Attorney
Texas Department of Protective and Regulatory Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2000-1105

Dear Mr. Phillips:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133548.

The Texas Department of Protective and Regulatory Services ("PRS") received a request for information regarding a specified Solicitation for Offer, including the proposal of the winning vendor, the Solicitation for Offer itself, and the resulting contracts with the winning vendor, additional vendors, and subcontractors. You have notified the third party whose interests are at issue, in accordance with section 552.305 of the Government Code, in order to allow it to establish the applicability of an exception to disclosure should it seek to protect the information from public disclosure. *See* Open Records Decision No. 542 (1990). You state that you have provided the portions of the requested information which the third party does not seek to withhold.

The third party whose information was requested, Andersen Consulting, did submit arguments asserting that portions of the information are excepted from disclosure based on section 552.110 of the Government Code. Section 552.110 excepts from required disclosure:

- (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from [required public disclosure].
- (b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from [required public disclosure].

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information. A “trade secret”:

may consist of any formula, pattern, device, or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

The determination of whether any particular information is a trade secret is a determination of fact.¹ Noting that an exact definition of a trade secret is not possible, the Restatement lists six factors to be considered in determining whether particular information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (2) the extent to which it is known by employees and others involved in [the company’s business];
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; [and]

¹Open Records Decision No. 552 at 2 (1990).

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.²

Open Records Decision No. 552 (1990) noted that the attorney general is unable to resolve disputes of fact regarding the status of information as “trade secrets” and must rely upon the facts alleged or upon those facts that are discernible from the documents submitted for inspection. For this reason, the attorney general will accept a claim for exception as a trade secret when a *prima facie* case is made that the information in question constitutes a trade secret and no argument is made that rebuts that assertion as a matter of law.³

We have reviewed the arguments made by Andersen Consulting. We believe that Andersen Consulting has made a *prima facie* case that the information it seeks to withhold is excepted from required public disclosure under section 552.110. PRS may not release that information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one

²RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.–Austin 1999, pet. filed).


³Open Records Decision No. 552 at 5 (1990).

of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.-Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/ch

Ref: ID# 133548

Encl. Submitted documents

cc: Mr. Mack D. Holloway
Business Development Manager
PricewaterhouseCoopers, L.L.P.
600 Congress Avenue, Suite 1800
Austin, Texas 78701
(w/o enclosures)

Mr. Pat Jury
Andersen Consulting
1501 South MoPac, Suite 300
Austin, Texas 78746-7569
(w/o enclosures)